UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LODA AGENCY, INC. and FRANK LODA,	:	
Plaintiffs	:	
v.	:	3:001750 (EBB)
NATIONWIDE INSURANCE CO.,	:	
Defendant	:	

RULING ON THE MOTION TO DISMISS

INTRODUCTION

Defendant Nationwide Insurance Co., ("NIC" or "Defendant") has moved to dismiss seven counts of the ten-count Complaint filed by Loda Agency, Inc. and Frank Loda (collectively "Loda" or "Plaintiffs"). Specifically, Defendant challenges the First Count, to the extent that it relies on events beyond the applicable statute of limitations; the Second Count, because a principal cannot be liable with tortiously interfering with the business expectancies of its agent; the Third and Ninth Counts because a Connecticut Unfair Practices Act ("CUTPA") claim does not arise from the relationship between a principal and its agent; the Fourth and Eighth Counts because (a) an insurance agent cannot allege a Connecticut Unfair Insurance Practices ("CUIPA") claim against its principal and (b) CUIPA does not

provide for a private cause of action; and the Tenth Count because the terms of Plaintiffs' contract, incorporated by reference into the Complaint, permit the very acts complained of by Plaintiffs.

STATEMENT OF FACTS

The Court sets forth only those facts deemed necessary to an understanding of, and decision rendered on, this Motion. The facts are culled from the Complaint, the parties' moving papers and documents incorporated by reference into the Complaint.

Loda was an independent contractor of NIC. He alleges that from 1985 through 1987, he acted as the exclusive NIC agent in order to write NIC's commercial insurance for an account of a certain K. Klarides Supermarkets, Inc. ("KSI"). Frank Loda, as agent for NIC, received commissions on this account.

In 1987, NIC determined not to renew its policy with KSI. However, in 1991, NIC agreed to insure KSI, albeit through a different one of its independent contractor insurance agents. Loda asserts that his Agreement with NIC prohibited this conduct.

NIC settled Loda's original complaint in 1997 by agreeing to assign to him in the future a portion of the insurance policy renewal business from a third NIC insurance agency which was then closing. Loda now contends that the renewal commissions he received from this new business were less than the commissions he would have received from the KSI account.

Loda also asserts that NIC breached oral and written [1]/ agreements by (a) misrepresenting that its commercial insurance coverage was unavailable for KSI; (b) allowing or facilitating the diversion of the KSI's insurance agreements with NIC during 1991 and subsequent years; (c) not returning the entire KSI accounts and commissions earned thereby to Loda; (d) failing to provide Loda with proper compensation for his lost KSI commissions after the 1993 agreement; and (e) misrepresenting to Loda the value of the renewal commissions generated by the insurance policies for the third, now closed, NIC agency. These facts essentially form the basis for his interference with contractual relations, CUTPA and CUIPA counts.

Loda next alleges that, in the Spring of 1999, NIC announced that it intended to pay a one-time loyalty bonus to its career agents. Calculation of the bonus was based on insurance premiums generated by each independent contractor during the first six months of 1998 or 1999. Loda contends that, even though he generated the requisite amount of commissions during this time frame, NIC never paid him the bonus.

Loda retired on July 1, 1999. Loda's Complaint alleges that NIC did nothing to advise NIC policyholders for whom Loda had previously provided services of his retirement. NIC continued to provide these same customers with Loda's name, address and

[1]/ He does not distinguish between the two in his Complaint.

telephone number. Resultingly, Loda asserts that he had to expend his own monies on notifying his former clients of his retirement; respond to inquiries regarding coverage before his notice was received by them; and was required to allow NIC to continue to use his office. He claims that NIC was unjustly enriched by this conduct.

LEGAL ANALYSIS

I. The Standard of Review

Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. Spalding, 467 U.S. 69, 73, (1984). "The function of a motion to dismiss is merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984) *quoting* Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

Pursuant to a Rule 12(b)(6) analysis, the Court takes all well-pleaded allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiff.

Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). *See also* Conley v. Gibson, 355 U.S. 41, 45-46, (1957)(Federal Rules reject approach that pleading is a game of skill in which one misstep by counsel may be decisive of case). The proper test is whether the complaint, viewed in this manner, states **any** valid ground for relief. Conley, 355 U.S. at 45-46.

Although Loda does not attach his Agent's Agreement to the Complaint, the Court may consider this document in Ruling on the Motion to Dismiss, without converting it into a summary judgment motion. *See* F.R.Civ.P. 10(c). When a plaintiff fails to introduce a pertinent document to his Complaint, the defendant may introduce the exhibit as part of his motion attacking the pleading. Wright & Miller, 5 *Federal Practice & Procedure*: *Civil* at § 1327. *Accord*, Bryan v. Acorn Hotel, Inc., 931 F.Supp. 394, 395,(E.D.Pa.), aff'd 162 F.3d 1150 (1996). Here, the Agent's Agreement, attached to Defendant's moving papers and incorporated by reference in Plaintiffs' Complaint, will be considered in the Ruling on this Motion.

II The Standard As Applied [2]/

The CUIPA Counts: Four and Eight

In the Fourth and Eighth Counts, Plaintiffs assert that NIC violated CUIPA by its conduct in the relationship with Frank Loda

[2]/ The parties have not dealt with the Counts of the Complaint seriatim. Accordingly, the Court will also address each argument as it is presented and responded to.

as its independent contractor insurance agent.

Section 38a-815 of CUIPA prohibits any person engaging in a trade practice that is an "unfair method of competition or an unfair or deceptive act or practice in the business of insurance." Unfair practices in the business of insurance are defined at Section 38a-816. A careful reading of this lengthy statute reveals no unfair practice in the business of insurance among Loda and NIC. The allegations of the Complaint simply do not meet the standards of this statute.

Further, Plaintiffs' claims do not meet the three-prong test of the seminal case defining "business of insurance", Group Health & Life Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211-230 (1979). The three criteria to be employed in determining whether a particular practice involves the relationship between the insurer and its policyholders are:

> 1. Whether the practice has the effect of transferring or spreading a policyholders' risk;
>
> 2. Whether the practice is an integral part of the policy relationship between the insurer and the insured; and
>
> 3. Whether the practice is limited to entities within the insurance industry.

Each inquiry must be answered in favor of NIC. First, none of Plaintiffs' allegations concern the spreading, or have the effect of spreading, policyholders' risks. In the end, it is NIC which determines for whom it will write policies. There are no

allegations of this behavior by NIC in the Complaint.

Secondly, the practice must be between the **insured and the insurer**. Again, the claimed misconduct found in the Complaint has nothing to do with the policyholder-insurance company relationship but concerns NIC's relationship with one of its insurance sales agents.

Third, the practice at issue is not limited to entities within the insurance industry. Issues of failure to pay commissions, bonuses or other compensation exist in a multitude of industries.

What truly is an issue under the CUIPA counts are garden-variety breach of contract allegations. Counts Four and Eight are, accordingly, hereby DISMISSED.[3]/

The CUTPA Counts: Three and Nine

The central prohibition of CUTPA is contained in Section 42-110b(a), which provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in any trade or commerce." In determining whether a given action is "unfair", the Connecticut Supreme Court has adopted the so-called "cigarette rule" developed by the Federal Trade Commission Act. According to the cigarette rule, this Court must consider:

> (1) [W]hether the practice, without necessarily having been previously considered unlawful,

[3]/ The disposition on the Fourth and Eight Counts means that no determination of whether a private cause of action lies under CUIPA is required.

> offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other business].

Boulevard Associates v. Sovereign Hotel, Inc., 72 F.3d 1029, 1038 (2d Cir.1995), *quoting* Atlantic Richfield v. Canaan Oil Co., 202 Conn. 234, 239 (1987)(alterations in original). Although Plaintiffs assert that NIC's actions violate this statute, what has been incorporated in these counts is the alleged breaches of contract only. The Court agrees with Defendant and the vast majority of courts in Connecticut that a simple breach of contract is not sufficient

> to establish a violation of CUTPA, particularly where the count alleging CUTPA simply incorporates by reference the breach of contract claim and does not set forth in what respect the defendant's activities are either immoral, unethical, unscrupulous, or offensive to public policy.

Chaspek Mfg. Corp. v. Tandet, 1995 WL 447948 at *12 (Conn.Super Ct. June 16, 1995). *See also* Lester v. Resorts Camplands International, Inc., 27 Conn.App., 59, 62 (1992)(more than contract violation necessary to claim for punitive damages; requires calculated, deceitful, and unfair conduct associated with a breach of contract to sustain CUTPA damages); Emless Equipment Leasing Corp. v. Waterbury Transmissions, Inc., 41

Conn.Supp. 575, 580 (1991)("'simple breach of contract, even if intentional, does not amount to a violation of the Act; a [claimant] must show substantial aggravating circumstances attending the breach to recover under the Act'")(alteration in original); A. Secondino & Son, Inc. v. L.D. Land Co., 1994 WL 728775 at *2-3 (Conn.Super. Ct., December 29,1994)(recognizing that this rule is the majority rule in Connecticut).

Inasmuch as Loda has simply incorporated by reference the alleged breaches of contract found in Counts One and Five and fails to set forth **exactly** [4]/ how such conduct violates the cigarette rule, the Third and Ninth Counts are hereby DISMISSED.

The Second Count: Tortious Interference with a Contract.

In the Second Count, Loda asserts that NIC interfered with the contractual relationship between Loda and KSI. However, the direct parties to the insurance contract at issue are KSI and NIC and not Loda and KSI.

Connecticut courts have long recognized a cause of action for tortious interference with contract rights or other business relations. *See, e.g.*, Blake v. Levy ,191 Conn. 257, (1983). "However, it is well-settled that the tort of interference with contractual relation only lies when a third party adversely affects the contractual relationship between the two parties."

[4]/ The CUTPA counts merely call the alleged breaches of contract "immoral, oppressive and unscrupulous" without ever explaining how they can be so characterized.

Paint Products Co. v. Minwax Co., 448 F.Supp. 656, 658 (D.Conn. 1998, *citing* Rand W Hat Shop v. Scully, 98 1, 14 (1992). Hence, "[i]n Connecticut, a party to a contract cannot be held liable for tortious interference with that contract." Urashka v. Griffin Hospital, 841 F.Supp. 468, 475 (D. Conn. 1994). *Accord*, Powell v. Feroleto Steel Co., 659 F.Supp. 303, 307 (D.Conn. 1996)(Cabranes, J.)(as a matter of law, party to a contract cannot interfere with that contract).

The parties to the contract of insurance in the present case are NIC and KSI. Loda was the independent contractor who brought the parties together but it still remains clear exactly who the contract of insurance was between. Loda was merely a third-party beneficiary of the contract between NIC and KSI, in that he received commissions for his work. At no time, did a contract directly exist between Loda and KSI. Accordingly, NIC cannot be held liable for tortiously interfering with its own contract.

The Plaintiffs have not brought to this Court's attention any authority that states otherwise nor has the Court in its own research found any. Accordingly, the Second Count is hereby DISMISSED.

Count One: The Statutes of Limitation

In Count One, two separate agreements are at issue. The first is "contractual agreements and policies" between NIC and its agents which "protected a broker such as Plaintiff LODA from

attempts by other Nationwide brokers or representatives to interfere with the underwriting, writing, or renewal of policyholders . . .". Plaintiffs assert that these agreements are written agreements and policies. [5]/ The second alleged agreement at issue is one in which NIC, in 1997, agreed that, in order to compensate the Plaintiffs for lost annual commissions from the KSI commercial account, NIC would assign to the Plaintiffs a portion of the renewal business of an NIC insurance agency which was closing. This is claimed to be a misrepresentation by NIC.

In their moving papers, Plaintiffs concede that the actions complained of in large part in Count One occurred outside the limitations period, from 1987 to 1991. Thus, all of these allegations are barred by the six-year statute of limitations. *See* Conn.Gen.Stat. § 52-581 (three year limitations for oral contract; § 52-576 (six year limitations for written contract).

This Complaint was filed in April, 2000. Thus, any actions alleged to have been done by NIC prior to April, 1994, are barred by the statute of limitations. Those include the refusal of NIC to renew KSI's commercial insurance from 1987 through 1991; allowing and/or facilitating the diversion of KSI's's commercial

[5]/ The Court has carefully reviewed the Corporate Agency Agreement between Loda and NIC and finds no such language therein. If there was a second policy which supports this contention, it was Plaintiff' burden to produce such a document.

insurance accounts during 1991 and subsequent years [6]/; and doing nothing to return the KSI commercial insurance accounts between 1991 and 1997. [7]/

The second claim is that NIC misrepresented the value of the renewal commissions from the insurance policies of a third, closing insurance agency. Further, it is contended that NIC failed to provide Loda with the compensation for the lost KSI commercial insurance commissions after 1997, as allegedly required by a settlement agreement of July, 1997.

Hence, any written agreements or contract drafted and executed before April, 1994 are barred by the statute of limitations. Any oral representations prior to April, 1997 are also barred by the statute of limitations for oral contracts.

Count One is hereby DISMISSED WITHOUT PREJUDICE. On or before October 31, 2000, Plaintiffs shall amend their Count One, asserting exactly when these circumstances occurred and attaching thereto any documents in support thereof. Any written agreements will not be considered unless they are dated after 1994.

Count Ten: Unjust Enrichment.

Plaintiff Frank Loda alleges that NIC was unjustly enriched

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[6]/ Any actions taken between 1991 and March, 1994 are barred by the six-year statute of limitations, in that this Agreement would have had to be in writing. *See*, Corporate Agency Agreement. Thus, the only viable claim, if it exists, is from March, 1994 to the present.

[7]/ Again, under the Corporate Agency Agreement, NIC had no obligations to return the KSI accounts to Loda.

after his retirement from NIC, in that NIC continued to use his office, send out bills with his name, address and telephone number on it, and send him mail for processing. He further claims that he gave ample notice of his retirement, yet NIC did nothing to advise NIC customers of this fact. As a result of the NIC's alleged inaction, Plaintiff Frank Loda asserts that he was forced to expend his own time and funds to prepare NIC notices to be sent out to customers and respond to many customer inquiries regarding NIC insurance quotations, renewals or policy issues, some of which he needed to respond to from his home.

In the Corporate Agency Agreement, Loda agreed:

> 1) . . . If this agreement is canceled, your name will be removed as soon as possible, but you acknowledge that occasional error may cause it to continue to be printed. (Corporate Agency Agreement at ¶14.)
>
> 2) . . . The agent hereby gives the Companies permission to use his name on those billings and for use of his name for a reasonable period of time following the cancellation. (Corporate Agreement at ¶16).

Plaintiff Frank Loda unfortunately has not specified when he was incurring these expenses, which would be critical to a decision as to the reasonableness of Defendant's action or inaction. The Motion is Denied as to the Tenth Count.

CONCLUSION

For each of the foregoing reasons the Motion to Dismiss [Doc. No. 15] is hereby GRANTED IN PART AND DENIED IN PART.

Counts Four, Eight, Three, Nine, and Two are hereby dismissed. The First Count and Tenth Counts shall be amended, if legally possible, within the dictates of this opinion, on or before October 31, 2000.

SO ORDERED

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ELLEN BREE BURNS

SENIOR UNITED STATES DISTRICT JUDGE

Dated at new Haven, Connecticut this ___ day of October, 2000.